

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

Date: September 30, 1997

Case No. **95 INA 679**

In the Matter of:

**ALICE ROG,**  
Employer

on behalf of

**IRENA JANINA CZYZ,**  
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of IRENA JANINA CZYZ (Alien) by ALICE ROG (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

### **STATEMENT OF THE CASE**

This case involves an application (ETA 750A) for the permanent employment of the Alien as a Kosher Household Cook with the following duties:

Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

The Employer specified in the ETA 750A that the Alien was to work a basic 40 hour week without overtime being anticipated. The hours were noted to be from 9:00 a.m. to 6:00 p.m., at a wage rate of \$499.20 per week.<sup>2</sup>

**Notice of Findings.** The CO's Notice of Findings (NOF) said that, subject to rebuttal, certification would be denied because it did not appear that the job duties described by the Employer in the form ETA 750A provided a position of full time work within the meaning of 20 CFR § 656.3. The CO explained that Employer could rebut this finding either by amending the job duties or by submitting evidence that the job does constitute full time employment and that this position has customarily been required by the Employer. The CO directed the Employer to file the specific evidence that follows:

State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.

If you are claiming you need to employ a cook on a full-time

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<sup>2</sup>The Alien stated in Form ETA 750B that she was currently in the United States on a B-2 Visa, had worked as a Kosher Cook for a family in Poland for a period of 3½ years, and that she was currently self-employed. As she did not disclose the nature of that self-employment, it is not assumed to be relevant to this proceeding.

basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.

Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that a family member has been performing these duties, you must supply evidence to support that this family member was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this family member started performing these duties.

Who will perform the general household maintenance duties, such as cleaning, laundry, vacuuming, etc.? If it is your position that the cleaning duties are performed by "part time help who comes in when needed", you must supply evidence to support, i.e., bills and canceled checks for the last 12 months.

Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

AF 31-32.<sup>3</sup>

**Rebuttal.** The Employer's rebuttal stated that she was "a patient at the Union County Gastroenterology Association diagnosed with a severe digestive disorder, requiring a specialized diet." She said a nutritionist had recommended that foods prepared by the cook should be low in fats/cholesterol /sodium, and rich in fiber, calcium, and such minerals as iron, potassium, magnesium, zinc, selenium, chromium, and others.

From Monday through Friday, the cook would be responsible for preparing breakfast, lunch, dinner, and evening snacks for all members of the household, plus an afternoon meal for the grandchildren. In addition, the cook would prepare meals for breakfast, lunch, and dinner for consumption on Saturday and Sunday by the household members and any relatives invited the weekend. The cook's other duties would include shopping for

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<sup>3</sup>The CO also requested evidence as to the care to be provided for any children in the Employer's household while the parents are absent from the home.

foodstuffs, and cleaning the kitchen and utensils after every meal.

The Employer explained that the proposed schedule did not allot specific times for performance of these duties, as the worker hired would ultimately develop the most productive and appropriate order of cooking procedures. On the other hand, the cook would be expected to prepare all of the indicated meals in no more than eight hours a day in a forty hour week.

While the Employer's daughter-in-law had done all the cooking for the household in the past, she would not continue to do so, and all household cooking was now performed by restaurants and catering services.<sup>4</sup> The Employer also said that all maintenance was now being done by various members of the household, and the Employer was caring for the grandchildren when their parents were absent.<sup>5</sup>

**Final Determination.** The Employer's application for certification was denied on the grounds that the Employer failed to meet the requirements of 20 CFR Part 656. Reviewing the Notice of Finding and the Rebuttal, the CO explained that the activities described by the Employer would not appear to take eight hours per day, forty hours per week to accomplish, based on the evidence of record.<sup>6</sup> Consequently, it had not been demonstrated that a full time position for a Domestic Cook existed in this household.

Noting that the employment of a full time cook was not customary in this household and that the cook's duties were limited to those stated in ETA Form 750A at Item 13, the CO said the evidence on entertainment did not add to Employer's proof of the volume of work that would be required of this worker, since the supporting evidence was vague. Consequently, the CO found that the Employer's evidence of record did not establish that a domestic cook is required to provide the services needed for the entertainment functions of this household.

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<sup>4</sup>The Employer said her household included herself, her son, her daughter-in-law, and three grandchildren.

<sup>5</sup>The Employer's rebuttal also included as items of evidence (1) a statement from the manager of a restaurant to the effect that the Employer is a long time customer, and that their chef understands and is able to accommodate Employer's dietary restrictions which, he said, makes it virtually impossible for her to prepare her own meals; and (2) an invoice from the Union County Gastroenterology Association for an office visit and blood test on March, 15, 1994 for treatment of acute gastritis. Although the rebuttal also indicated that Employer had transmitted sample recipes that are representative of the meals the cook would be preparing, no such evidence was received.

<sup>6</sup>While the CO cited 20 CFR § 656.50 as the source for the definition of employment in the regulations, the correct citation is 20 CFR § 656.3.

Finally, the CO found that, although the cook normally performs other related duties such as preparing prepackaged meals, shopping, and cleaning the kitchen and cooking equipment, it does not appear that such activities in this household would reasonably occupy a jobholder full-time, eight hours per day, 40 hours per week, regardless of what type of food the cook is preparing. After considering these findings, the CO concluded on the basis of the Notice of Finding and the Rebuttal that the Employer had not sustained the burden of proof under the Act and regulations, and that the position Employer offered does not constitute full time employment under 20 CFR § 656.3. As a result, the CO denied the alien labor certification the Employer sought in this application.

### **DISCUSSION**

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of \$12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties because it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer has not offered full time employment.

On the other hand, the NOF did raise an unresolved issue as to whether or not the position description requirement of two years of specialized cooking experience in the duties of a Kosher cook. The effect of this job requirement is to eliminate a U. S.

applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a restrictive job requirement, the Final Determination cannot be construed as having determined this issue after weighing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking Kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b)(2)(i)(B). In the event that the CO finds that the requirement of experience as a Kosher cook is unduly restrictive, Employer will be required to prove that the hiring of a Cook (Household)(Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of experience in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.

**ORDER**

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this file is remanded for reconsideration for the reasons hereinabove set forth.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

# BALCA VOTE SHEET

Case No. 95 INA 679

ALICE ROG, Employer  
IRENA JANINA CZYZ, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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This has been redrafted to meet your comments and is again submitted for the panel’s consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: September 8, 1997